STATE OF MICHIGAN

COURT OF APPEALS

CALDER DEVELOPMENT ASSOCIATES, INC., d/b/a BIOTRONIC,

Plaintiff-Appellant,

v

MELISSA KNUTH,

Defendant,

and

RICHARD W. SEYFRIED and MEGHAN K. SMITH,

Defendants-Appellees.

UNPUBLISHED
September 21, 2004

No. 248819
Oakland Circuit Court
LC No. 2002-043433-CZ

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of defendants' motion for summary disposition brought under MCR 2.116(C)(8) and (C)(10).[1] We affirm.

Plaintiff provides services to hospitals performing neurophysiological monitoring of patients during surgery. In December 1999, plaintiff hired Richard Seyfried to work as a monitoring clinician and in October 2001, Meghan Smith was hired to work as a monitoring clinician. The cost of training defendants was considerable. Both defendants left their employment with plaintiff in August 2002, and went to work for a competitor that was providing the same neurophysiological monitoring services plaintiff provides. The competitor, however, was providing those services to a hospital that had been plaintiff's client from 1983 until

[1] The trial court granted defendant Melissa Knuth's motion for summary disposition under MCR 2.116(C)(7), and released the cause of action against her to arbitration. Because she is not a party on this appeal, the term "defendants" refers only to appellees.

December 31, 2001, but with whom contract renewal negotiations had ended on January 9, 2002, approximately seven months before defendants began working for the competitor.

Defendants each signed a noncompetition agreement as employees of plaintiff, and plaintiff sought to enforce the noncompetition agreement and brought suit, seeking damages, injunctive relief, and an extension of the noncompetition agreement to compensate for the time defendants allegedly violated the agreement.

The clause of the agreement at issue states:

> **Non-Solicitation**. During the period commencing on the date of this Agreement and expiring on the second anniversary of the voluntary or involuntary termination of the Employee's employment with the Company (the "Restricted Period"), the Employee shall not (other than on behalf of the Company) directly engage in a Restricted Activity with a Current Company Account or indirectly engage in a Restricted Activity with a current Company Account by having an interest (whether as an employee, independent contractor, officer, director, shareholder, consultant, partner, member, sole proprietor, or joint venture participant) in any business that engages in any Restricted Activity with a Current Company Account. The term "Current Company Account" means a hospital, other medical facility or organization, or a medical practitioner: (a) with which the Company, as of the date of this Agreement or within 180 days preceding the last date of the Employee's employment with the Company (the "Employment Termination Date"), has a contractual relationship or to which the company, as of the date of this Agreement or within 180 days preceding the Employment Termination Date, provides a Restricted Activity, or (b) with which the Company, as of the date of this Agreement or within 180 days preceding the Employment Termination Date, has conducted negotiations to provide a Restricted Activity. The term "Restricted Activity" means Monitoring Services (including Monitoring Services other than intraoperative monitoring), any other service that the Company provides and in which the Employee is or was involved during the Employee's employment with the Company, and any marketing, business development, or sales activity with respect to any of the foregoing. Nothing contained in this Agreement shall be deemed to limit the Employee's right to engage in Restricted Activity with or for any party other than a Current Company Account.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), alleging that the noncompetition agreement was unenforceable because it was unreasonable under MCL 445.774a. Defendants specifically took issue with the part of the agreement that defined a "Current Company Account" as including a hospital that had a contractual agreement with plaintiff as of the time the agreement was executed. Defendants argued that the court should only apply that part of the agreement that defined "Current Company Account" as a hospital that had a contractual agreement "within 180 days preceding the last date of the Employee's employment with [plaintiff]." The trial court agreed and modified the agreement accordingly. In light of the modification, the trial court held that, because the hospital at which defendants were working as monitoring clinicians had not been a "Current Company Account" with plaintiff during the last 180 days of defendants' employment, defendants were not in breach

of the noncompetition agreement and granted defendants' motion for summary disposition. Plaintiff's motion for reconsideration was denied and this appeal followed.

Plaintiff initially argues that the trial court committed error requiring reversal when it found that the noncompetition agreement was unenforceable as a matter of law. After de novo review and considering the evidence submitted in the light most favorable to plaintiff, we disagree. See *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 483-484; 650 NW2d 670 (2002).

MCL 445.774a(1) provides,

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Here, the essential question is whether the provision in the agreement defining "Current Company Account" as one that has a contractual agreement with plaintiff as of the date of the noncompetition agreement can be considered "reasonable as to its duration." We agree with the trial court's conclusion that it was not. MCL 445.774a, permits an employer to obtain from an employee an agreement that protects its reasonable competitive business interest. A provision that prohibits a former employee from working for a competitor for a period of time that, under the terms of the provision, could extend five, ten, fifteen years or more beyond the contractual relationship between the former client and the employer is not reasonable. Therefore, the trial court properly granted summary disposition to defendants.

Plaintiff further argues that the trial court was unreasonable when it failed to hold an evidentiary hearing to determine what would constitute a reasonable modification of the contract before granting defendants' motion for summary disposition and making such a modification. However, plaintiff, as the nonmoving party, "still had the burden of producing evidence showing a material dispute of fact in order to survive" defendants' motion. *Old Kent Bank v Sobczak,* 243 Mich App 57, 62; 620 NW2d 663 (2000). Plaintiff has not adequately supported its argument that the circumstances of this motion for summary disposition merited an exception to the rule that motions brought under MCR 2.116(C)(10) are to be based on documentary evidence, MCR 2.116(G)(3) and (4), and has therefore abandoned this issue on appeal. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Finally, plaintiff argues that the trial court committed error requiring reversal by unreasonably modifying the contract to limit the definition of a "Current Company Account" to the entities with which plaintiff had an active business relationship within the last 180 days of defendants' employment. This argument was raised for the first time in plaintiff's motion for reconsideration before the trial court. We review the trial court's denial of a motion for reconsideration for an abuse of discretion. *Herald Co, Inc v Tax Tribunal,* 258 Mich App 78, 82-

83; 669 NW2d 862 (2003). To establish that the trial court committed an abuse of discretion, plaintiff must demonstrate that "the trial court made a palpable error and that a different disposition would result from correction of the error." MCR 2.119(F)(3). "Moreover, a motion for reconsideration that merely presents the same issues already ruled on by the court generally will not be granted." *Herald Co, Inc, supra*.

The trial court denied plaintiff's motion for reconsideration on the basis that it had already ruled on the issues underlying the motion. Seemingly based on the brevity of the trial court's articulation of its denial of the motion, plaintiff contends that the trial court had no basis for determining why it considered 180 days a reasonable period of time to protect plaintiff's business interests. This misconstrues the nature of the trial court's underlying determination that the noncompetition clause was unreasonable, because the trial court did nothing more than grant defendants' requested relief when modifying the contract.

The trial court did not modify the duration of the noncompetition agreement, two years, but modified the definition of what constituted a "Current Company Account" to which the noncompetition agreement applied. The trial court struck the language extending the definition of a "Current Company Account" to entities that were plaintiff's clients at the time that the agreement was signed, leaving the definition to include only entities that were plaintiff's clients within 180 days of defendants' respective separation dates from plaintiff's employment. See MCL 445.774a(1). Plaintiff does not establish that the trial court committed palpable error when it denied its motion for reconsideration, apparently on the basis that it considered the reasonableness of its contract modification to have been previously determined. Furthermore, in the agreement itself, plaintiff had considered the 180-day limit to be reasonable. The trial court did not abuse its discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens